



February 7, 2000

Ms. Elaine S. Hengen  
Assistant City Attorney  
Office of The City Attorney  
The City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2000-0453

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 131978.

The El Paso Police Department (the “department”) received a written request for all records pertaining to a particular internal affairs investigation. You state that some of the requested information has been released. You contend that the remaining information is excepted from required public disclosure pursuant to sections 552.101, 552.103, and 552.130 of the Government Code.

You explain that the information at issue

relates to a personnel matter that was investigated by [the department] in conjunction with the City Attorney’s Office. The investigation was concluded and it was determined by the Chief of Police that the allegation made against [the officer] was sustained and a one day suspension was imposed against the officer. Whenever discipline is imposed against a City employee, the employee has a right to appeal any such suspension to a hearing office [sic] appointed by the Civil Service Commission. . . . Every disciplinary appeal may potentially result in a lawsuit . . . .

The Seventy-sixth Legislature amended section 552.103 of the Government Code to read as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated at the time the request for the information is received, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997), *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You argue that this office should recognize the disciplinary appeal process as a form of litigation under the Public Information Act; however, you also state that the requested information relates to a concluded investigation and that, "[t]he time allotted for [the officer] to appeal the imposition of his one day suspension has not yet run." You have provided this office with no information, however, suggesting that the officer intends to pursue an appeal of his suspension. Thus, even assuming *arguendo* that the disciplinary appeal process constitutes "litigation" for purposes of section 552.103, you have not demonstrated that in this particular instance such litigation was reasonably anticipated at the time the city received the records request. We therefore conclude that you have not met your burden of demonstrating the applicability of section 552.103 in this instance. The city may not withhold any of the requested information under section 552.103.

You also contend that certain documents contained within the internal affairs file must be withheld from the public pursuant to section 552.101 of the Government Code as criminal history record information ("CHRI"). Section 552.101 of the Government Code protects

"information considered to be confidential by law, either constitutional, statutory, or by judicial decision." A criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, any CHRI the department obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F. Additionally, in *United States Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749 (1989), the U.S. Supreme Court concluded that where an individual's CHRI is compiled or summarized by governmental entity, the information takes on a character that implicates individual's right of privacy in a manner that the same individual records in an uncompiled state do not. We have placed yellow flags on the documents the department must withhold pursuant to section 552.101 as CHRI.

Finally, section 552.130(a)(1) of the Government Code requires that the department withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the department must withhold the photocopies of the driver's license. We have also marked for redaction information on two additional documents that the department must withhold pursuant to section 552.130(a)(1).

In summary, except for that information that we have indicated as being confidential under sections 552.101 and 552.130 of the Government Code, the requested information must be released. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

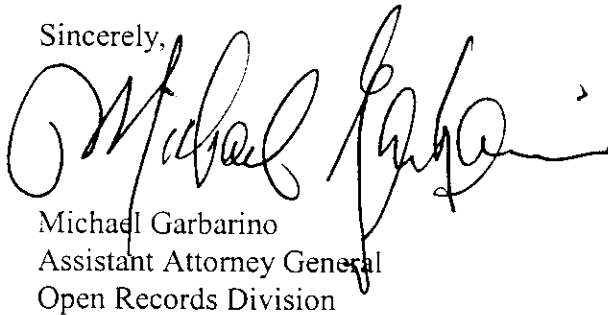
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/RWP/nc

Ref.: ID# 131978

cc: Mr. Lawrence Lujan  
Pebble Hills Regional Command Center  
10780 Pebble Hills Boulevard  
El Paso, Texas 79935-2039  
(w/o enclosures)